A

Ng Gee Yeong & Anor v RHB Bank Bhd

B

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCC-77–09 OF 2018
NANTHA BALAN J
26 NOVEMBER 2018

C

Civil Procedure — Execution — Leave to issue execution more than six years after judgment — Whether leave should be granted — Rules of Court 2012 O 46 r 2(1)(a)

D

Civil Procedure — Judgments and orders — Setting aside — Defendants applied to set aside judgment in default — Whether defendants entitle to set aside or appeal — Whether order was 'ex parte' or 'inter partes'

E

This was an appeal by the defendants against the decision of the learned session court judge in dismissing the defendant's application to set aside an order by the session court judge on 15 November 2017, whereby leave pursuant to O 46 r 2(1)(a) of the Rules of Court 2012 ('the ROC 2012') was granted to allow the plaintiff to execute a judgment, albeit that more than six years had passed since judgment was entered against the defendants. In the present case, judgment in default was obtained by the plaintiff against the defendants on 19 April 2006. Pursuant to s 6(3) of the Limitation Act 1953, the plaintiff had 12 years to commence any execution based on the judgment in default. Under O 46 r 2(1)(a) of the ROC 2012, leave was required for any execution on a judgment after a lapse of six years from the date of judgment. It followed therefore that the plaintiff could execute as of right, within six years from the date of judgment in default. The issue for consideration was whether from the time judgment in default was entered, the plaintiff was indolent and just slept on their rights and did nothing, or whether they took active steps to recover the judgment sum, by way of any execution or other proceedings. The plaintiff argued that hearing on 15 November 2017 was an inter partes hearing and the defendants must appeal against the order instead of applying to set aside.

F

G

H

Held, allowing the appeal, setting aside session court judge's order and ordering plaintiff to pay cost of RM3,000 to defendants subject to 4% allocator:

I

(1) Based on the cases referred, it was held that the order that was made in such circumstances, was an ex parte order. Hence if the order dated 15 November 2017 was regarded as an ex parte order then it was clear that the defendants might apply to the present court to set it aside. Thus,

A the proper procedure was for the defendants to apply to set aside the order rather than to file an appeal against the order. Hence, the plaintiff's contention that the defendants must appeal in order to challenge the ex parte order dated 15 November 2017 was without any legal foundation (see paras 10–11).

B

(2) As a matter of general principle, an appellate court would ordinarily defer to the judgment of the court below which exercised its original jurisdiction in exercising discretion to grant leave. But, such discretion must necessarily and obviously be exercised in accordance with proper C legal principles and not capriciously. The plaintiff, as a judgment creditor, must provide a reasonable and satisfactory explanation for any delay or inaction of their part, in terms of execution of judgment in default. In any event, the present solicitors took over conduct in November 2016 but yet they only filed the application for leave in D November 2017. That in itself constituted a delay of one year. The cumulative delay since 6 August 2014 that was when the creditor petition was reinstated, was in the circumstances unreasonable and had not been satisfactorily explained. It was plainly obvious that the plaintiff did not render a reasonable and satisfactory explanation for the significant gap E from 6 August 2014–7 November 2017 and as such, the discretion of the court ought not to have been exercised in favour of the plaintiff (see paras 13–14, 18 & 21).

[Bahasa Malaysia summary

F Ini adalah rayuan oleh defendan-defendan terhadap keputusan hakim mahkamah sesyen yang bijaksana dalam menolak permohonan defendan untuk mengetepikan perintah oleh hakim mahkamah sesyen pada 15 November 2017, di mana kebenaran menurut A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') telah diberikan untuk G membenarkan plaintif melaksanakan penghakiman, walaupun lebih daripada enam tahun telah berlalu sejak penghakiman dibuat terhadap defendan-defendan. Dalam kes ini, penghakiman ingkar telah diperolehi oleh plaintif terhadap defendan-defendan pada 19 April 2006. Selaras dengan s 6(3) Akta Had Masa 1953, plaintif mempunyai 12 tahun untuk memulakan H apa-apa pelaksanaan berdasarkan penghakiman ingkar. Di bawah A 45 k 2(1)(a) KKM 2012, kebenaran diperlukan untuk pelaksanaan penghakiman setelah enam tahun berlalu dari tarikh penghakiman. Oleh itu plaintif boleh melaksanakan haknya, dalam masa enam tahun dari tarikh penghakiman ingkar. Isu untuk pertimbangan adalah sama ada dari tarikh penghakiman I ingkar dimasukkan, plaintif adalah lewa dan hanya membiarkan hak mereka dan tidak melakukan apa-apa, atau sama ada mereka mengambil langkah-langkah aktif untuk mendapatkan semula jumlah penghakiman, dengan cara mana-mana pelaksanaan atau prosiding lain. Plaintif berpendapat bahawa pendengaran pada 15 November 2017 adalah pendengaran inter

partes dan defendan-defendan mesti merayu terhadap perintah tersebut dan bukannya memohon untuk mengetepikan.

Diputuskan, membenarkan rayuan, mengetepikan perintah hakim mahkamah sesyen dan mengarahkan plaintif untuk membayar kos sebanyak RM3,000 kepada defendan-defendan tertakluk kepada 4% allocator:

(1) Berdasarkan kes-kes yang disebutkan, adalah diputuskan bahawa perintah yang dibuat dalam keadaan sedemikian, adalah perintah ex parte. Oleh itu jika perintah bertarikh 15 November 2017 dianggap sebagai perintah ex parte maka adalah jelas bahawa defendan-defendan boleh memohon kepada mahkamah ini untuk mengetepikannya. Oleh itu, prosedur yang betul adalah untuk defendan-defendan untuk memohon untuk mengetepikan perintah itu dan bukannya memfailkan rayuan terhadap perintah itu. Oleh itu, pandangan plaintif bahawa defendan mesti membuat rayuan untuk mencabar perintah ex parte bertarikh 15 November 2017 adalah tanpa sebarang asas undang-undang (lihat perenggan 10–11).

(2) Sebagai perkara prinsip umum, mahkamah rayuan biasanya akan menangguhkan penghakiman mahkamah di bawah yang menjalankan bidang kuasa asalnya dalam menjalankan budi bicara untuk memberikan kebenaran. Tetapi, budi bicara tersebut semestinya dan jelas dilaksanakan menurut prinsip undang-undang yang wajar dan tidak dengan semena-mena. Plaintif, sebagai pemiutang penghakiman, mesti memberikan penjelasan yang munasabah dan memuaskan untuk apa-apa kelewatan atau ketidakupayaan bahagian mereka, dari segi pelaksanaan penghakiman ingkar. Dalam apa jua keadaan, peguam mengambil alih perkara pada bulan November 2016 tetapi mereka hanya memfailkan permohonan untuk kebenaran pada bulan November 2017. Itu sendiri merupakan kelewatan satu tahun. Kelewatan kumulatif sejak 6 Ogos 2014 adalah apabila petisyen pemiutang dikembalikan semula, dalam keadaan tidak munasabah dan tidak dijelaskan dengan memuaskan. Adalah jelas bahawa plaintif tidak memberikan penjelasan yang munasabah dan memuaskan untuk jurang yang ketara dari 6 Ogos 2014–7 November 2017 dan oleh itu, budi bicara mahkamah sepatutnya tidak dilaksanakan untuk memihak kepada plaintif (lihat perenggan 13–14, 18 & 21).]

Notes

For cases on leave to issue execution more than six years after judgment, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3765–3770.

For cases on setting aside, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5784–5856.

Cases referred to

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (refd)
Duer v Frazer [2001] 1 All ER 249, QBD (refd)
Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445, HC (refd)
Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors [2013] 3 MLJ 299, HC (refd)
Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457, FC (refd)
Soh Poh Sheng v Malayan Banking Bhd [2017] 4 MLJ 689, CA (refd)
United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546 (refd)
United Overseas Bank Ltd v Chung Khiaw Bank Ltd [1968] 2 MLJ 85, FC (refd)

Legislation referred to

Limitation Act 1963 s 6(3)
Rules of Court 2012 O 46 r 2(1)(a)

Tseng Seng Guan (Lai & Assoc) for the appellants.
Chong Poh Geok (Kimberly Yap Mei Chyi with her) (Che Mohktar & Ling) for the respondent.

Nantha Balan J:

[1] This is an appeal by the defendants against the decision of the learned sessions court judge ('the SCJ') dated 5 September 2018 dismissing the defendants' application dated 27 June 2018 to set aside an order by the SCJ on 15 November 2017,whereby 'leave', pursuant to O 46 r 2(1)(a) of the Rules of Court 2012, was granted to allow the plaintiff to execute on a judgment, albeit that more than six years had passed since judgment was entered against the defendants. For convenience, the parties shall be referred to by their original titles in the sessions court, as 'the plaintiff', 'the defendants' or the first defendant ('D1') and the second defendant ('D2'), respectively.

[2] In this case, judgment in default ('JID') was obtained by the plaintiff against the defendants on 19 April 2006. Pursuant to s 6(3) of the Limitation Act 1963, the plaintiff has 12 years to commence any execution based on the JID (ie by 18 April 2018). However, under O 46 r 2(1)(a) of the Rules of Court 2012, leave is required for any execution on a judgment after a lapse of six years from the date of the judgment. It follows therefore that the plaintiff can execute as of right, within six years from the date of JID (ie by 18 April 2012).

[3] In dealing with the issue of whether leave should be granted, it is necessary to determine whether from the time JID was entered, the plaintiff was indolent and just slept on their rights and did nothing, or whether they took active steps to recover the judgment sum, by way of any execution or other proceedings. In so far as the defendants are concerned, they contend that leave ought not to have been granted as the plaintiff had slept on their rights. In the affidavit of D1 affirmed on 14 June 2018, the defendants aver at para 9 that:

> 9. Saya dinasihati oleh peguamcara Defendan-Defendan dan sesungguhnya percaya bahawa Defendan-Defendan mempunyai merit bagi menentang dan/atau membela Notis Permohonan tersebut dan Perintah tersebut atas alasan-alasan yang berikut:
>
> i. Defendan-Defendan telah menyebabkan kelewatan yang melampau (*inordinate delay*) selama 11 tahun 7 bulan semenjak Penghakiman tersebut direkodkan.
>
> ii. Kelewatan yang melampau tersebut adalah gagal dijelaskan oleh Plaintif dengan alasan yang konkrit, munasabah, mencukupi (*sufficient*) dan meyakinkan (*convincing*).
>
> iii. Plaintif tidur atas haknya dan kini diestop daripada melaksanakan Penghakiman tersebut.
>
> iv. Tiada bukti penjelasan (*explanatory evidence*) dilampirkan oleh Plaintif untuk menjelaskan dan memberikan justifikasi justify) kelewatan yang melampau tersebut.
>
> v. Kelewatan yang melampau tersebut telah memprejudiskan dan menjejaskan hak Defendan-Defendan.
>
> vi. Defendan-Defendan gagal, enggan dan/atau cuai untuk mendedahkan fakta dan bukti secara penuh dan jujur di Mahkamah yang Mulia ini.
>
> vii. Interest of justice mesti dipertahankan dan dikekalkan oleh Mahkamah yang Mulia ini.

[4] Thus, the picture that the defendants sought to potray was that the plaintiff did absolutely nothing for about 11 years and seven months since the JID. However, the plaintiffs response is that they did take action during this period and this may be seen from the affidavit of Nor Ashikin bt Sulaiman affirmed on 25 July 2018 where she states:

> 20. Saya menafikan perenggan 5 Afidavit Sokongan Defendan Pertama dan Defendan Kedua tersebut dan saya ingin menyatakan bahawa dakwaan Defendan Pertama dan Defendan Kedua bahawa Plaintif hanya mengeluarkan perlaksanaan Penghakiman Ingkar Kehadiran bertarikh 19.04.2006 selepas 11 tahun dan 7 bulan adalah tidak benar dan sengaja mengelirukan Mahkamah Yang Mulia ini.
>
> 21. Saya sesungguhnya percaya bahawa Defendan Pertama dan Defendan Kedua gagal dan/atau enggan untuk mendedahkan kepada Mahkamah Yang Mulia Ini fakta dan bukti yang jujur dan sebenar kerana:

(a) Plaintif telah melaksanakan haknya sebagai Pemegang Serah Hak di bawah Perjanjian Pinjaman dan Surat Ikatan Penyerahakkan masing-masing bertarikh 29.07.1997 dengan melelongkan hartanah Defendan Pertama dan Defendan Kedua pada tarikh-tarikh dan harga-harga rizab berikut tetapi tidak berjaya:

TARIKH LELONGAN	HARGA RIZAB
29.08.2005	RM1 00,000.00
03.10.2005	RM 90,000.00
14.11.2005	RM 81,000.00
27.12.2005	RM 72,900.00

(b) Selanjutnya, hartanah Defendan Pertama dan Defendan Kedua telah berjaya dilelong pada 17.05.2007 dengan Harga Jualan sebanyak RM65,610.00;

Sekarang dikemukakan dan ditunjukkan kepada saya sesalinan Perisytiharan Jualan bertarikh 29.08.2005, 03.10.2005, 14.11.2005, 27.12.2005 dan 17.05.2007 yang ditandakan secara kolektif sebagai Ekshibit 'NAS-2'.

(c) Selanjutnya, Plaintif telah mendepositkan ke dalam akaun Defendan Pertama dan Defendan Kedua setelah menerima deposit Harga Jualan sebanyak RM3,300.00 pada 22.05.2007 dan RM62,310.00 pada 12.11.2007. Setelah menolak segala kos perbelanjaan untuk lelongan awam, Plaintif telah mendepositkan sebanyak RM53,517.71 ke dalam akaun Defendan Pertama dan Defendan Kedua.

(d) Namun demikian, hasil jualan tersebut tidak dapat menyelesaikan keseluruhan jumlah hutang Defendan Pertama dan Defendan Kedua kepada Plaintif dan masih terdapat baki hutang sebanyak RM281,150.65 setakat 12.08.2015 yang perlu dibayar oleh Defendan Pertama dan Defendan Kedua kepada Plaintif;

Sekarang dikemukakan dan ditunjukkan kepada saya sesalinan Penyata Akaun setakat 12.08.2015 yang ditandakan sebagai Ekshibit 'NAS-3'.

(e) Plaintif telah melaksanakan Penghakiman Ingkar Kehadiran tersebut dengan memulakan prosiding kebankrapan terhadap Defendan Pertama dan Defendan Kedua dengan memfailkan Notis Kebankrapan di bawah Kebankrapan No. 29-4365-7-2012 dan No. 29-4366-7-2012 di Mahkamah Tinggi Kuala Lumpur pada 27.12.2012 dan Petisyen Pemiutang pada 20.03.2013;

Sekarang dikemukakan dan ditunjukkan kepada saya sesalinan Petisyen Pemiutang untuk Kebankrapan No. 29-4365-7-2012 dan No. 29-4366-7-2012 yang ditandakan sebagai Ekshibit 'NAS-4'.

(f) Defendan Pertama dan Defendan Kedua telah memfailkan Saman Dalam Kamar pada 08.05.2013 untuk mengenepikan Petisyen Pemiutang tersebut dan permohonan Defendan Kedua telah dibenarkan oleh Penolong Kanan Pendaftar Puan Zaridah Binti Y. Abdul Jaapar pada 24.02.2014;

Sekarang dikemukakan dan ditunjukkan kepada saya sesalinan Saman Dalam Kamar bertarikh 08.05.2013 yang ditandakan sebagai Ekshibit 'NAS-5'.

(g) Selanjutnya, Plaintif telah memfailkan Notis Rayuan pada 07.03.2014 dan

rayuan Plaintif telah dibenarkan oleh Yang Arif Datuk Lau Bee Lan pada 06.08.2014;

Sekarang dikemukakan dan ditunjukkan kepada saya sesalinan Notis Rayuan bertarikh 07.03.2014 dan Perintah bertarikh 06.08.2014 yang ditandakan secara kolektif sebagai Ekshibit 'NAS-6'.

(h) Plaintif tidak dapat meneruskan prosiding kebankrapan terhadap Defendan Pertama dan Defendan Kedua selepas 06.08.2014 kerana fail bagi kes ini dipindahkan daripada Tetuan Azri, Lee Swee Seng & Co. kepada Tetuan Che Mokhtar & Ling, peguamcara Plaintif kini pada sekitar November, 2016;

(i) Selanjutnya, peguamcara Plaintif melalui surat bertarikh 17.11.2016 kepada peguamcara Defendan Pertama dan Defendan Kedua untuk mendapatkan status kes kebankrapan terhadap Defendan Pertama dan Defendan Kedua serta melalui surat bertarikh 16.02.2017, peguamcara Plaintif telah menyerahkan salinan draft Perintah bertarikh 06.08.2014 untuk kelulusan peguamcara Defendan Pertama dan Defendan Kedua. Sejurusnya, peguamcara Plaintif melalui surat bertarikh 28.03.2017 menyerahkan kepada Defendan Pertama sesalinan Perintah bermeterai bertarikh 06.08.2014;

Sekarang dikemukakan dan ditunjukkan kepada saya surat-surat peguamcara Plaintif bertarikh 17.11.2016, 16.02.2017 dan 28.03.2017 yang ditandakan secara kolektif sebagai Ekshibit 'NAS-7'.

(j) Selepas itu, peguamcara Plaintif telah melalui surat bertarikh 23.08.2017 memohon kepada Mahkamah Tinggi Kebankrapan Kuala Lumpur supaya menetapkan satu tarikh pengurusan kes untuk Petisyen Pemiutang menurut Perintah bertarikh 06.08.2014 dan Mahkamah Tinggi Kebankrapan telah menetapkan tarikh pendengaran masing-masing pada 08.11.2017, 29.11.2017, 20.12.2017 dan 10.01.2018; dan

Sekarang dikemukakan dan ditunjukkan kepada saya surat peguamcara Plaintif bertarikh 23.08.2017 yang ditandakan sebagai Ekshibit 'NAS-8'.

(k) Walaupun Penghakiman Ingkar Kehadiran tersebut telah melebihi tempoh 6 tahun; Notis Permohonan untuk Kebenaran Mengeluarkan Perlaksanaan adalah tidak diperlukan pada masa tersebut kerana Notis Kebankrapan Plaintif telah difailkan pada 27.12.2012 (iaitu sebelum keputusan kes *Dr Shamsul Bahar Bin Abdul Kadir v RHB Bank Berhad* [2015] 4 MLJ 1); dan

(l) Akan tetapi, semasa pendengaran pada 08.11.2017, Mahkamah Tinggi Kebankrapan telah mengarahkan Plaintif untuk memfailkan Notis Permohonan untuk Kebenaran Mengeluarkan Perlaksanaan sebagai tujuan formaliti.

[5] Thus, based on the sequence of events as per the plaintiffs affidavit (referred to above), it cannot be disputed that from the time JID was obtained, steps were in fact taken by the plaintiff towards recovery of the judgment sum. In this regard, the action that the plaintiff took was principally to enforce a legal assignment of property held under title HS(D) 24871 No PT 3267 Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor Darul Ehsan, which was

given by way of security for the banking facility that was granted by the plaintiff to the defendants via loan agreement dated 29 July 1997. The enforcement of the legal assignment took several years to complete and the proceeds of sale pursuant to the auction were not enough to settle the judgment sum and there was a shortfall. Thereafter, the plaintiff took out bankruptcy proceedings against the defendants. But, the defendants applied to set aside the creditors petition ('CP'). The defendants succeeded before the senior assistant registrar who allowed the setting aside of the CP. However, on appeal by the plaintiff, the judge of the High Court reinstated the CP. The CP was reinstated on 6 August 2014. It is apposite to now focus on the events post 6 August 2014. In this regard, nothing really happened since 6 August 2014. Of course, by then six years had passed since the JID and leave would have been necessary for any execution.

[6] The present solicitors for the plaintiff, namely Messrs Che Mokhtar & Ling, apparently took over conduct from the previous solicitors in November 2016. On 7 November 2017, the plaintiff filed the application for 'leave' under O 46 r 2(1)(a) of the Rules of Court 2012 (p 42 AR). The application was served on the defendants. But, the defendants did not appear at the hearing. And the plaintiffs application for leave was accordingly allowed on 15 November 2017.

[7] On 27 June 2018, the defendants filed the application to set aside the leave that was granted by the SCJ. On 5 September 2018, it was dismissed. Hence, the appeal before me. The plaintiff says that hearing on 15 November 2017 was an inter partes hearing and that the defendants must appeal against the order instead of applying to set it aside.

[8] Therefore the primary question is whether the order dated 15 November 2017 is an ex parte order or an inter partes order? In this regard, Chua J in *United Overseas Bank Ltd v Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 (Singapore) opined (at p 87) that:

> It is clear then that a judge may proceed ex parte to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an ex parte application. *It is the hearing which is ex parte and an order made on such a hearing is an ex parte order* within the terms of Order LIII rule 4(1). (Emphasis added.)

[9] It is relevant to note that the following Malaysian High Court cases have leaned towards the same conclusion:

(a) *United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546; and

(b) *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990]

1 MLJ 445 ('*Loo Chay Meng*'s case'). A

[10] In the cases referred to above, it was held that the order that was made in such circumstances, is an 'ex parte' order. Hence, if the order dated 15 November 2017 is regarded as an ex parte order then it is clear that the defendants may apply to this court to set it aside. Thus, the proper procedure is for the defendant to apply to set aside the order rather that to file an appeal against the order. To round off on this point, I should add that in *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457 (FC) at para 39, the Federal Court referred to *Loo Chay Meng*'s case and reiterated that the court has jurisdiction to set aside such an order which is intrinsically ex parte in nature. The Federal Court said: B C

> [39] Jurisdictionally, a court under O 32 r 6 of the RHC or under O 92 of the RHC, may set aside any ex parte order. In *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445 at pp 446–447, VC George J held that the court could even set aside an ex parte final order pursuant to O 32 r 6 of the RHC. This provision has general application to general applications and proceedings in chambers, and unless there were specific rules elsewhere that do away with the said rules of general application, it was applicable in an ex parte garnishment proceedings. D E
>
> In fact VC George J had no hesitation in holding that even if O 32 r 6 were inapplicable the court still was equipped with inherent jurisdiction to prevent injustice. See also *Hongkong and Shanghai Banking Corporation Sdn Bhd v Goh Su Liat (Telecommunication Authority of Singapore, garnishee)* [1986] 2 MLJ 86; [1984–1985] SLR 804 and *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448. F

[11] Hence, the plaintiffs contention that the defendants must appeal in order to challenge the ex parte order dated 15 November 2017, is without any legal foundation. The objection that was raised by the plaintiff is accordingly dismissed. G

[12] I turn now to the merits of the appeal. At the outset, I should mention that I did not have the benefit of the SCJ's grounds of judgment which would have shed light on the basis for the exercise of the court's 'discretion' to grant 'leave' to execute. H

[13] Of course, as a matter of general principle, an appellate court will ordinarily defer to the judgment of the court below which exercised its original jurisdiction in exercising the discretion to grant leave. But such discretion must necessarily and obviously be exercised in accordance with proper legal principles and not capriciously. I

[14] The salutary principle which should inform the court's discretion is that

the plaintiff as judgment creditor, must provide a reasonable and satisfactory explanation for any delay or inaction on their part, in terms of execution of the JID.

[15] The relevant criteria which is to be taken when considering whether to extend time where more than six years has lapsed since judgment was entered, was lucidly stated by Evans-Lombe J in *Duer v Frazer* [2001] 1 All ER 249 at p 255 as follows:

> ... the court would not, in general, extend time beyond six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in the *National Westminster Bank* case, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor.

(See also *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2013] 3 MLJ 299 (HC)).

[16] In the present case, looking at the events which transpired since the JID, no complaint may be made of the conduct of the plaintiff until around 6 August 2014 as the plaintiff was actively pursuing their remedies against the defendants. However, there is a problem with the state of affairs after 6 August 2014 as things seem to have thereafter, gone into 'hibernation'. Simply put, *inertia* seems to have set in after 6 August 2014.

[17] First, there is a delay of three years from 6 August 2014–7 November 2017, when the application for leave was made. In this regard, Messrs Che Mokhtar & Ling, the solicitors for the plaintiff, give the excuse that there was a delay in the transition of the file from the previous solicitors. But, I cannot imagine that it would have taken a few years merely for a transition of a file from one law firm to another.

[18] In any event, the present solicitors took over conduct in November 2016, but yet they only filed the application for leave in November 2017. That in itself constitutes a delay of one year. I am accordingly of the view that the cumulative delay since 6 August 2014 (*when the CP was reinstated*) is, in the circumstances, unreasonable and has not been satisfactorily explained.

[19] For completeness, I should add that an issue was raised in the course of

arguments before me, in respect of the setting aside of the CP with regard to whether 'leave' under O 46 r 2(1)(a) of the Rules of Court 2012 was required before the CP could be filed in respect of a judgment where more than six years had lapsed. The issue here was whether bankruptcy was part of the process of 'execution' (see *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1 (FC) and *Soh Poh Sheng v Malayan Banking Bhd* [2017] 4 MLJ 689 (CA)).

[20] However, I hasten to add that the topic of whether the plaintiff required leave to file the CP after six years had lapsed from date of judgment, is a live issue in the bankruptcy/insolvency court wherein a ruling has already been made by the judge of that court and is, in due course, to be ventilated on appeal to the Court of Appeal.

[21] Confining myself to the sole issue of whether in the present circumstances, leave ought to have been granted, it is my view that if the SCJ had looked carefully at the situation from 6 August 2014 onwards, it would been plainly obvious that the plaintiff did not render a reasonable and satisfactory explanation for the significant 'gap' from 6 August 2014–7 November 2017 and as such, the discretion of the court ought not to have been exercised in favour of the plaintiff.

[22] Consequently, I am of the view that the SCJ should not have exercised the discretion in light of the plaintiffs indolence in the matter from 6 August 2014 onwards. For these reasons, the defendants' appeal is allowed. The SCJ's order dated 15 November 2017 is set aside. The plaintiff is to pay costs of RM3,000 (*subject to 4% allocatur*) to the defendants.

Appeal allowed; sessions court judge's order set aside; plaintiff ordered to pay costs of RM3,000 to defendants subject to 4% allocator.

Reported by Mohd Kamarul Anwar